

## **Ganta (Migration) [2021] AATA 827 (26 March 2021)**

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### **DECISION RECORD**

|                                   |                                                                                                     |
|-----------------------------------|-----------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>                  | Migration & Refugee Division                                                                        |
| <b>APPLICANT:</b>                 | Mr Bharath Chowdary Ganta                                                                           |
| <b>CASE NUMBER:</b>               | 1935433                                                                                             |
| <b>HOME AFFAIRS REFERENCE(S):</b> | BCC2019/4339253                                                                                     |
| <b>MEMBER:</b>                    | Stephen Witts                                                                                       |
| <b>DATE:</b>                      | 26 March 2021                                                                                       |
| <b>PLACE OF DECISION:</b>         | Melbourne                                                                                           |
| <b>DECISION:</b>                  | The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa. |

Statement made on 26 March 2021 at 10:43am

### **CATCHWORDS**

*MIGRATION – Student (Temporary) (Class TU) – Subclass 500 (Student) – bogus documents and false or misleading information provided with visa application – payslips and work reference for former employment – departmental investigations found company does not exist – no other corroboration provided – compassionate or compelling circumstances justifying grant of visa – investment in business in rural location employing Australian citizens – business could be operated by foreign national – decision under review affirmed*

### **LEGISLATION**

*Migration Act 1958 (Cth), ss 5(1), 65*  
*Migration Regulations 1994 (Cth), Schedule 2, cl 500.217, Schedule 4, criterion 4020(1), (5)*

### **LEGISLATION**

*Arora v MIBP [2016] FCAFC 35*  
*Batra v MIAC [2013] FCA 274*  
*Plaintiff M64/2015 v MIBP [2015] HCA 50*  
*Trivedi v MIBP [2014] FCAFC 42*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 27 November 2019 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicant applied for the visa on 30 August 2019. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate made a finding that the applicant had provided a bogus or misleading document in accordance with PIC 4020.
6. The applicant appeared before the Tribunal on 25 March 2021 to give evidence and present arguments. The applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

### CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217 for the grant of the visa. Broadly speaking, this requires that:
  - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
  - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
  - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
  - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

**Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?**

10. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
11. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
13. According to the delegate's decision record dated 27 November 2019, provided to the Tribunal by the applicant, the applicant provided evidence to the department that was considered to be bogus. According to the delegate in August 2019 the applicant provided evidence to the Department that was considered to be of a non-genuine nature to meet the genuine entrant criterion for a student visa. In particular, the delegate asserted that the applicant provided a work reference dated 20 April 2016 from a software technology company which stated that the applicant worked for this company as a software engineer from May 2014 up until 20 April 2016. According to the delegate the applicant also provided an employment appraisal dated 1 April 2015 from the same company, and salary payslips for the months of January, February, and March 2016 for hours worked at this company. Also included was a letter regarding the applicant's supposed resignation from this company dated 20 April 2016. According to the delegate departmental investigations conducted in relation to his employment with this company concluded that this company did not exist, and that the material provided by the applicant was bogus.
14. According to the delegate the applicant was provided with 28 days to provide comment on this material. According to the delegate the applicant did so stating that he has tried to contact this employer for further information but could not find his previous manager. However, he stated that he did manage to speak to the human resource manager who provided an alternative address for the company. According to the delegate it assessed this information and determined that it would rely upon its earlier investigations and place greater weight on them.
15. According to the delegate it also considered whether there were compassionate and compelling circumstances and made a finding that there were no such circumstances.
16. The Tribunal has considered all the evidence before it including evidence taken at hearing. In particular the Tribunal has considered a statement by the applicant dated 20 March 2021 stating that the documents that he gave to the Department were all original copies and that he was genuinely employed by the company. He also stated that he had a letter from his previous manager that will verify his tenure with the company and that he had no intention to provide bogus information or documents to the Department. The Tribunal also notes that the

applicant provided a statement to the Department dated 23 October 2019 in regard to the invitation to respond to the Department stating that he had not been able to contact his previous manager but that he had spoken to the human resource manager of the business and that it now has a new address and contact point.

17. At hearing the Tribunal had a discussion with the applicant regarding his application, specifically the contentions made by the delegate in regard to the provision of bogus documents regarding the applicant's asserted employment made during the course of his student visa application.
18. The Tribunal noted to the applicant that in his statement of purpose provided to the Tribunal on 20 March 2021 that he had stated that he had attached an actual letter from the manager in that employment workplace, Mohan Kutti, but that the applicant in fact had not attached such a letter. The Tribunal asked the applicant to clearly state whether such a letter actually existed. After some discussion the applicant stated that such a letter did not in fact exist but that he had provided a statement to the Department that he had tried to contact this person and had been unable to do so at the time but did provide a new address for that particular business. He also asserted again that he had spoken to a human resource manager with that business.
19. The Tribunal asked the applicant if he had any other specific documentation or evidence in regard to this asserted employment other than that statement made to the delegate at that time. The applicant stated that he did not have any other information or documented evidence in regard to this particular matter. The Tribunal is concerned by this evidence as the applicant has previously asserted to the Department and now asserts to the Tribunal that he did work with this employer and that he did speak to somebody from this employer and even find an alternative address. However, it is noted by the Tribunal that no actual factual documented evidence or documents have been provided to demonstrate that the applicant ever worked with this particular employer or that it even exists.
20. The Tribunal is concerned about this because it is reasonable to expect that if the applicant in fact had not provided bogus information to the department and had in fact worked for the employer legitimately that he said he worked for during this period, that during the course of this time until this hearing before the Tribunal, a reasonably lengthy period of time, he would have been able to provide some form of documented evidence or witness statements to the Tribunal that in fact he had worked there as he had previously asserted. The Tribunal notes as above that even in his statement of purpose to the Tribunal on 20 March 2021 he stated that *"I have attached a letter from my previous manager- Mohan Kutti, that will verify my tenure with the company"*. The Tribunal notes that in fact as outlined above no such material or evidence has actually been provided. The Tribunal also notes that in evidence provided by the applicant's representative, the applicant's representative acknowledged that there was no further documented evidence in regard to this matter on that specific question.
21. The Tribunal has considered this matter very carefully and finds that the applicant, despite being given significant opportunities to provide alternative evidence to support his assertion that he in fact was employed by this company and that it actually existed during that time, that he has not done so, and that he also provided evidence and statements in regard to this matter that the Tribunal found concerning. The Tribunal finds that the applicant's evidence in this regard is not plausible and that he did, in fact, provide bogus and misleading information to the Department in that context.
22. The Tribunal therefore finds that there is evidence before the Tribunal that the applicant has given, or cause to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a medical officer of the Commonwealth a bogus document, as defined in s.5(1), i.e. a document that the Tribunal reasonably suspects are documents that purport to have

been, but were not, issued in respect of the person, or were counterfeit or have been altered by a person who does not have authority to do so, or obtained because of a false or misleading statement whether or not made knowingly.

23. The Tribunal also finds that it is information that is false or misleading in a material particular as defined in PIC 4020(5), that is information that is false or misleading at the time it is given in relation to the visa application.
24. Therefore, the applicant does not meet PIC 4020(1).

**Should the requirements of PIC 4020(1) or (2) be waived?**

25. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
26. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
27. For the following reasons, the Tribunal is satisfied that the requirements should not be waived.
28. At hearing the Tribunal had a discussion with the applicant as to whether there are any compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the grant of the visa.
29. The applicant stated that there were such grounds in that he had invested up to AU\$300,000 in a petrol station in a rural location that employed up to 4 Australian citizens and therefore there were compelling circumstances that affect the interests of Australia, or specifically, compassionate or compelling circumstances that affect the interest of an Australian citizen.
30. The Tribunal had a detailed discussion with the applicant about this matter and notes that no evidence was actually provided in regard to the assertion of this fact. However, after some consideration the Tribunal finds that it accepts that this assertion made by the applicant that he has invested money in an Australian business that employs Australian citizens may be accurate.
31. The Tribunal has considered this matter carefully and notes that the applicant's investment in an Australian business, that he may work in himself on a part-time basis, at this particular point in time is an investment that is managed under appropriate prudential regulation and guidelines within the Commonwealth of Australia and that it could easily continue to be run as such as a reasonable investment by a foreign national, in this case the applicant, and that there is actually no reason why the applicant must remain in Australia as a temporary visa holder to ensure that this business continues and employs Australian citizens. Australia enjoys significant investments by foreign nationals from all over the world, including India, and these investments are protected and nurtured by statute and commonly accepted business practice. It is further noted by the Tribunal that the applicant can return to his home

country and that such an investment can continue to return on its investment to the applicant's advantage and that this business can continue to operate or even grow and employ more Australian citizens.

32. The Tribunal therefore finds that there are no compelling circumstances that affect the interests of Australia that justify the grant of the visa and nor are there any compelling or compassionate circumstances that affect the interests of an Australian citizen that justify the grant of the visa in this case.
33. Therefore, the requirements of PIC 4020(1) or (2) should not be waived.
34. Concluding paragraphs
35. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217.
36. The Tribunal also finds that the applicant does not meet the criteria for any other subclass within the class of visa sought.

### **DECISION**

37. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Stephen Witts  
Member

## ATTACHMENT

### Migration Regulations 1994

#### Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
  - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
  - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
  - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

## ***Migration Act 1958***

### **s 5 Interpretation**

(1) In this Act, unless contrary intention appears:

...

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...